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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1279

THE WILLIAMS & WILKINS COMPANY,

Petitioner,

—against—

THE UNITED STATES,

Respondent.

PETITIONER'S REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI

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This is in reply to the Brief for the United States filed April 30, 1974 in opposition to the Petition for Certiorari.

1. The Government admits, as it must, that this is a case "of substantial interest to libraries, researchers and publishers" (Brief in Opposition, p. 5). However, its notion that the decision below is nevertheless "a narrow one" (Brief in Opposition, p. 6) is mistaken. The Government libraries here provide thou-

sands of copies of complete articles to thousands of users on a systematic basis. The grounds of the majority opinion dealing with these operations make it clear to libraries throughout the country that there are no effective limits on photocopying.

The broad import already accorded the decision in this case thus far is dramatically illustrated by a development subsequent to the filing of this Petition for Certiorari. On March 24, 1974, *The New York Times* in a comprehensive article (p. 59) reported that a consortium of libraries—presently Harvard, Yale, Columbia and the New York Public Library, but to be expanded as soon as possible to include other libraries—had embarked on "a sweeping and controversial program of combined operations that will entail cutting back purchases of many publications and systematically exchanging photocopies of previously published writings." Although "(t)he early stages of this project are expected to cost $10 million to $15 million," library officials state that there is no plan for the libraries to pay royalties. "They cite a recent United States Court of Claims decision in a case known as Williams & Wilkins, as supporting their position."

Although it is traditional for an opponent of certiorari to argue the narrowness of a decision, the facts simply do not support such an assertion here.

2. The Government attempts to minimize this case of first impression involving photocopying with the argument that such copying has been common practice at least since 1935 (Brief in Opposition, p. 6). This argument must fall in the face of the record, the Government's concession in its brief below (p. 46) that as late as 1958 "there was virtually no photocopying as presently practiced," and the recognition by the majority below that "the proliferation of inexpensive and improved copying machines, less than two decades ago, led to the surge of such duplication" (App. 18).

3. The possible role of Congress in no way diminishes the importance of this case. Indeed, the lack of success thus far in

updating the Copyright Law has been noted in detail by this Court since the filing of this petition. See *Teleprompter Corp.* v. *Columbia Broadcasting System*, Nos. 72-1628, 72-1633, decided March 4, 1974, 181 USPQ 65, at 72, n. 16. It may be noted that the detailed regulation of copyright-broadcasting relationships left to Congress in *Teleprompter* is to be contrasted with the judge-made rule of fair use dominating this case. This doctrine should continue to be given life by the courts and not be legislatively frozen. See H. R. Rep. No. 83, 90th Cong., 1st Sess., 29 (1967); App. 26, n. 28; and Brief in Opposition, p. 4, n. 2.

4. The Government grossly oversimplifies petitioner's attack on the holding of the Court of Claims majority. (There is no recognition anywhere in the Brief of dissent by three judges and the issues they raise.) While petitioner certainly deems pertinent its reasonable licensing proposals (see Petition, p. 7, n. 7 and p. 18), we urge the Court to rely on the petition, rather than the Government's characterizations, for petitioner's statement of why it believes that the Government's massive, systematic million-page copying operations constitute copyright infringement and not fair use.

CONCLUSION

It is respectfully submitted that for all the reasons stated in the petition and herein, a writ of certiorari should be granted.

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